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Winnebago Industries, Inc.

9 UNITED STATES DISTRICT COURT

10 DISTRICT OF NEVADA

11 GORDON WOOD, an Individual,
12 Plaintiff,

13 v.

14 WINNEBAGO INDUSTRIES, INC.,
15 Defendant.

Case No.: 2:18-cv-01710-JCM-PAL

**DEFENDANT'S EMERGENCY MOTION
TO COMPEL PER LR 7-4**

16
17 COMES NOW, Defendant, WINNEBAGO INDUSTRIES, INC., by and through its
18 undersigned counsel of record at MESSNER REEVES, LLP, pursuant to LR 7-4, hereby requests
19 Emergency Relief in the form of an order allowing a test drive of the subject vehicle to be conducted
20 at the upcoming inspection set for Tuesday February 26, 2019.

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1 This Motion is made and based upon Fed. R. Civ. Pro. 34 and 37, the points and authorities
2 provided below, the affidavits, pleading and papers referenced herein and attached hereto and such
3 arguments as may be adduced therefrom upon the hearing of this matter.

4 DATED this 26 day of February, 2019.

5 MESSNER REEVES, LLP

6
7 By Nicholas Hamilton

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16 *Attorneys for Defendant*

17 *Winnebago Industries, Inc.*

18 **AFFIDAVIT OF NICHOLAS L. HAMILTON**
19 **IN COMPLIANCE WITH LR 7-4 AND 26-7**

20 STATE OF NEVADA)
21) ss.
22 COUNTY OF CLARK)

23 I, Nicholas L. Hamilton, do hereby declare as follows:

24 1. That I am an attorney of law duly licensed to practice in all courts of the State of
25 Nevada and an attorney with the law firm of MESSNER REEVES, LLP, the attorneys of record for
26 Defendants herein;

27 2. That I have personal knowledge of the matters set forth below and could competently
28 testify thereto if called to do so, and I attest to the contents of this affidavit in support of Defendants'
instant motion;

3. That the factual assertions and representations made in Defendants' instant Motion *in*
limine are true and correct to the best of my knowledge;

4. That an expert inspection of the subject vehicle is set for Tuesday, February 26 at 9:00
a.m. in Las Vegas Nevada.

1 **POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Pursuant to Federal Rules of Civil Procedure 34 and 37, Defendant, Winnebago Industries, by
4 and through their counsel, Messner Reeves LLP, through counsel, hereby move this Court on an
5 emergency basis to compel Plaintiff to allow a test drive of the recreational vehicle that is the subject
6 of the Plaintiff's complaint.

7 Plaintiff's refusal to allow a test drive of the subject vehicle is unreasonable as the Plaintiff
8 asserts multiple non-conformities whose presence or absence can only be confirmed by a test drive.
9 The Plaintiff cites vague safety concerns that are unsupported by the vehicle's service history or by
10 basic facts generally known to those familiar with the recreational vehicle industry.

11 Plaintiff's refusal to allow a test drive will irredeemably prejudice the defendants by
12 effectively thwarting the ability of the Defendant's expert to perform a fundamental investigation into
13 multiple issues and to allow the Plaintiff to assert uncontroverted assertions concerning the safety of
14 the subject vehicle.

15 An inspection of the subject vehicle is presently set for Tuesday, February 26, 2019, and will
16 require multiple individuals travelling from out of state. Defendants seek this motion on an
17 emergency basis due to the proximity of the upcoming inspection.

18 This motion is based upon the points and authorities attached hereto, the declaration of
19 Nicholas L. Hamilton in compliance with LR 26-7(c), the affidavit of Enoch Hutchcraft and all of the
20 pleadings and papers on file in this case.

21 **II. STATEMENT OF RELEVANT FACTS**

22 Plaintiff's complaint, filed July 31, 2018, arises from the Plaintiff's allegations that the
23 Winnebago Recreational Vehicle that he purchased on April 22, 2017. The subject vehicle was a
24 2016 Grand Tour 42 HL that the Plaintiff alleges was defective at this time of purchase. Plaintiff's
25 complaint alleges Breach of Warranty/Contract, Violation of the Magnusson Moss Warranty Act, and
26 violations of Nevada's Deceptive Trade Practices Act.

1 On March 31, 2018, Plaintiff's counsel submitted a demand letter to Defendant, asserting the
 2 existence of 18 alleged non-conformities.¹ The first five of these assertions cannot be confirmed
 3 without a test drive of the subject vehicle:²

- 4 1. *Entry step rattles loudly when in transit sounds like its loose and is moving*
 5 *back and forth.*
- 6 2. *Front corner driver side window has air leak when driving at freeway*
 7 *speeds.*
- 8 3. *Parking brake warning light and buzzer come on randomly while driving.*
- 9 4. *Navigation system and satellite radio do not work.*
- 10 5. *Auto level flashed blue and red saying jacks are down when they are not.*

11 On February 1, 2019, Defendant's counsel reached out to Plaintiff's counsel requesting a test
 12 drive to verify whether the foregoing complaints were continuing.³ These complaints are in fact
 13 discussed in the report of the Plaintiff's expert, Thomas Bailey, produced on February 11, 2019.⁴ Mr.
 14 Bailey's report includes a Matrix entitled "RV Problem Analysis." The first five complaints set forth
 15 in that matrix coincide with the complaints discussed above and four of the five complaints are
 16 indicated as ongoing problems.⁵

17 On February 19, at 9:50 p.m., Plaintiff's co-counsel, George West, forwarded an e-mail⁶
 18 denying Defendant's request for a test drive of the subject vehicle, stating the following:

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25 ¹ See Demand Letter, attached hereto as Exhibit A.

26 ² See Affidavit of Defendant's expert, Enoch Hutchcraft, attached hereto as Exhibit B.

27 ³ See e-mail dated February 1, 2019, attached hereto as Exhibit C.

28 ⁴ See report of Thomas Bailey, attached hereto as Exhibit D.

⁵ See Exhibit D, at p. 10.

⁶ See e-mail from Plaintiff's counsel, George West, dated February 19, 2019, attached hereto as Exhibit E.

1 After speaking with Ron (Plaintiff's counsel) late tonight, who is in depositions
 2 all day tomorrow in Indiana, and in keeping with Ron's previous position and
 3 email to you regarding any driving of the RV as part of your expert's
 4 inspection,⁷ and after speaking with our expert, and **given the current condition**
 5 **of the sliders, which could very well slide out while driving, among other**
 6 **issues,**⁸ and after talking to our expert about the serious **safety issues with**
 7 **driving the vehicle in its current condition,**⁹ we will *not* allow the RV to be
 8 driven as part of your expert's inspection set for this next Tuesday, February
 9 26th. Your expert can start the engine, do what needs to get done with his
 10 inspection or testing while the engine is operating, but no driver operation on
 11 city streets.

12 Our expert conducted the inspection and formulated his opinions without having
 13 to drive the vehicle and he would have driven the vehicle, but for the serious
 14 safety issues involved with driving the vehicle on public roads. If your expert
 15 feels that driving the vehicle is necessary for him to complete his report after
 16 conducting all of his testing and inspection without driving the vehicle, then you
 17 will need to move for a court order compelling that, and then it will be the
 18 Court's call. But we cannot allow our client to be liable for any accidents or
 19 other injuries that may occur based on the operation of the vehicle on city streets
 20 by your expert in its current condition. Your expert has our expert's report, and
 21 everything in that report can be equally tested, inspected, operated and/or
 22 photographed. We wanted to make sure we had clarity on this issue prior to the
 23 inspection beginning.

24 Mr. West's e-mail represents the first instance, that could be identified by the undersigned, in
 25 which it is claimed that the subject vehicle is unsafe to drive. **Mr. Bailey's report explicitly states**
 26 **that, of the nineteen issues he identified from the vehicle's service history, not one single issue**
 27 **was considered by him to be "Likely to Cause an Accident or Get Someone Seriously Hurt," or**
 28 **be a "Potential Fire Hazard."**¹⁰

Nowhere in Mr. Bailey's 44 page report does he himself identify any issues that he asserts
 makes the RV unsafe to drive, nor were any such issues identified by Defendant's expert.¹¹ The safety

⁷ Presumably, Mr. West is referring to communications between Mr. Burdge and Defendant's counsel that predated the e-mail communication of February 1, 2019.

⁸ Emphasis added.

⁹ Emphasis added.

¹⁰ See Exhibit D at pp. 10, 11.

¹¹ See Exhibit D; see Exhibit B.

1 issues complained of concerning the slide-outs for the subject vehicle are not reflected anywhere in
2 the vehicle's service history.¹²

3 Moreover, any safety concerns regarding the slide-out are wholly unfounded. Slide-outs do
4 not simply fall out or deploy on their own while driving; as they possess internal safety mechanism
5 that prevent such occurrences.¹³

6 By this motion, Defendant's request an order allowing Defendant's expert to perform a test
7 drive of the subject vehicle as part of his inspection to be conducted on February 26, 2019. Plaintiff's
8 concerns as to the safe drivability of the subject vehicle are wholly without foundation. Furthermore,
9 it is apparent that the Plaintiff seeks to assert allegations that the Subject Vehicle is unsafe to use in its
10 current state, while at the same time foreclosing the ability of the Defendant's expert to meaningfully
11 investigate these allegations.

12 **III. ARGUMENT**

13 Defendants' request for a test drive is appropriate pursuant to Federal Rule of Civil Procedure
14 34. Moreover, the information requested is relevant and discoverable under Federal Rule of Civil
15 Procedure 26. Plaintiff's eleventh hour objections concerning their supposed safety concerns have
16 been forced Defendant to bring this Motion to Compel as a result of Plaintiff's complete refusal to
17 cooperate. Pursuant to Federal Rule of Civil Procedure 37, Defendants request that the Court enter an
18 order compelling Plaintiff to allow a test drive as part of the inspection to be conducted by
19 Defendant's expert.

20 Federal Rule of Civil Procedure 37(a)(2)(B) permits Plaintiff to move for an order compelling
21 Defendant to perform a test drive in accordance with Federal Rule of Civil Procedure 34. The Federal
22 Rules of Civil Procedure are designed to permit broad inquiry into any matter relevant to the pending
23 action. *See, e.g., Hickman v. Taylor*, 329 U.S. 495, 501 (1947)(explaining Federal Rules of Civil
24 Procedure intended to permit parties to inquire into all facts relative to issues in case and obtain fullest
25 possible knowledge of issues and facts prior to trial). Federal Rule of Civil Procedure 26(b)(1) states,
26 in part, [p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the

27 ¹² See Exhibit. B.

28 ¹³ See Exhibit. B.

1 claim or defense of any party Relevant information need not be admissible at the trial if the
2 discovery appears reasonably calculated to lead to the discovery admissible evidence. The broad scope
3 of discovery is intended to remove surprise from trial preparation so the parties obtain evidence
4 necessary to evaluate and resolve their dispute. Toward this end, Rule 26(b) is liberally interpreted to
5 permit wide-ranging discovery of all information reasonably calculated to lead to the discovery of
6 admissible evidence. *Kaufman v. Board of Trustees*, 168 F.R.D. 278, 280 (C.D. Cal. 1996).

7 Federal Rule of Civil Procedure 34 permits a party to make a request for inspection and
8 photographing within the scope of Rule 26(b). As Rule 26 states, parties may obtain discovery
9 regarding any matter relevant to the subject matter of the pending action. Rule 34 is clear that a party
10 must produce and permit the requesting party entry onto property in the possession or control of the
11 party upon whom the request is served.

12 Plaintiff's objections as to the safety and usability of the subject vehicle render the test drive
13 even more essential now than before Mr. West's e-mail of February 19, 2019. The potential
14 ramifications of such allegations on this litigation are profound and Defendant will be irreparably
15 prejudiced if its expert is not allowed to fully investigate them. Such prejudice would be in addition to
16 that incurred should Defendant's expert not be allowed to verify and investigate the four issues
17 discussed in Plaintiff's Demand Letter of March 31, 2018 that his expert has indicated as ongoing.

18 Therefore, Defendants seek the Court's intervention compelling Plaintiff to allow a test drive
19 of the subject vehicle. If for whatever practical reason (not owing to the Plaintiff's unfounded safety
20 concerns) a test drive cannot be conducted on February 26, 2019, the Defendant requests an order
21 from the Court allowing Defendant's expert to conduct the test drive on a subsequent, mutually
22 agreeable date and time, the costs of which to be borne by Plaintiff.

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Plaintiff should be Ordered to allow a test drive of the subject vehicle at the upcoming inspection of February 26, 2019, or else be made to bear the cost of a test drive conducted by Defendant's expert at a subsequent date and time.

MESSNER REEVES, LLP

Nicola Hemminger

Winnebago Industries, Inc.

CERTIFICATE OF SERVICE

The undersigned does hereby certify that I am an employee of Messner Reeves LLP, and that on this 21 day of February, 2019, I served a true and correct copy of the foregoing **DEFENDANT'S EMERGENCY MOTION TO COMPEL PER LR 7-4** to all parties on file with the CM/ECF, as follows:

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